REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION-MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 198 OF 2016

IN THE MATTER OF: AN APPLICATION BY DR. PETER AYODO OMENDA, NICHOLAS KARUME WEKE, CALEB INDIATSI MBAYI, ABRAHAM KIPCHIRCHIR SAAT, MICHAEL MAINGI MBEVI, GODWIN MWAGAE MWAWONGO AND BRUNO MUGAMBI LINYIRU FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ANTI-CORRUPTION COURT CASE NO. 20 OF 2015 – REPUBLIC VS. NICHOLAS KARUE WEKE & OTHERS

IN THE MATTER OF: AND/OR THE VIOLATION OF ARTICLES 10, 22, 23, 27, 28, 29, 50, 157, 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ABUSE OF POWERS CONFERRED BY SECTIONS 4, 5 AND 6 OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT NO. 2 OF 2013

AND

IN THE MATTER OF: AND/OR BREACH OF SECTIONS 7(1), (2), 8, 9, 10, 11 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 5 OF 2015

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTER 26, LAW OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

DR. PETER AYODO OMENDA…………..……………...1ST APPLICANT

NICHOLAS KARUME WEKE…………….…….…….....2ND APPLICANT

CALEB INDIATSI MBAYI ……………………….……....3RD APPLICANT

ABRAHAM KIPCHIRCHIR SAAT….…………………....4TH APPLICANT

MICHAEL MAINGI MBEVI…..……………………..…....5TH APPLICANT

GODWIN MWAGAE MWAWONGO…………………..…...6TH APPLICANT

BRUNO MUGAMBI LINYIRU…………………………...7TH APPLICANT

VERSUS

THE DIRECTROR OF PUBLIC PROSECUTIONS…........RESPONDENT

AND

THE ETHICS AND ANTI-CORRUPTION

COMMISSION…………………...……………1ST INTERESTED PARTY

CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT AT

MILIMANI LAW COURTS, NAIROBI…..........2ND INTERESTED PARTY

APPLICANTS:

DR. PETER AYODO OMENDA…………………..……....1ST APPLICANT

NICHOLAS KARUME WEKE…………………………..2ND APPLICANT

CALEB INDIATSI MBAYI ……………………………....3RD APPLICANT

ABRAHAM KIPCHIRCHIR SAAT…………..…………..4TH APPLICANT

MICHAEL MAINGI MBEVI……..…………………..…....5TH APPLICANT

GODWIN MWAGAE MWAWONGO.…………………...6TH APPLICANT

BRUNO MUGAMBI LINYIRU…………………………....7TH APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th May, 2015, the ex parte applicants herein seek the following orders:

> **1) THAT the Honourable Court be pleased to issue an order of certiorari to remove and bring to this Honourable Court for purpose of quashing the decision of the 1st interested party to recommend to the Respondent that the Applicants be charged with various Anti-Corruption offences and decision of the Respondent to direct prosecution of the Applicants, Applicants Nicholas Karume Weke, Abraham Kipchirchir Saat, Peter Ayodo Omenda,**

Godwin Mwagae Mwawongo, Caleb Indiatsi Mbayi, Bruno Mugambi Linyiru and Michael Maingi Mbevi as contained in the press statement from the office of the Director of Public Prosecutions dated 13/11/2015 and in the charge sheet in the Anti-Corruption Case No. 20 of 2015 *Republic of Kenya -Vs- Nicholas Karume & 8 others* before the Chief Magistrate's Court, Milimani law Courts, Nairobi.

2) THAT the Honourable Court be pleased to issue an order of prohibition prohibiting the Respondent from prosecuting, sustaining ,proceeding ,hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case Number 20 of 2015 between the *Republic vs Nicholas Karume & 8 others* before the Chief Magistrate's Court Milimani law Courts Nairobi so far as they touch on or relate or howsoever concern the 1st, 2nd, 3rd 4th, 6th 7th and 9th accused (Applicants herein) Nicholas Karume Weke, Abraham Kipchirchir Saat, Peter Ayodo Omenda, Godwin Mwagae Mwawongo, Caleb Indiatsi Mbayi, Bruno Mugambi Linyiru and Michael Maingi Mbevi respectively in Count I, or instituting any other charges in any other Court against the Applicants over the award of Tender No. REF. GDC/HQS/086/2011-12 and the contract of Tender No. REF. GDC/HQS/086/2011-12 between Geothermal Development Company (GDC) and Bonfide Clearing and Forwarding Company Ltd in respect of rig move services.

3) THAT the Honourable Court be pleased to issue an order of prohibition prohibiting the Respondent from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti Corruption Case Number 20 of 2015 between the *Republic –Vs- Nicholas Karume & 8 others* before the chief magistrate's Court Milimani law Courts Nairobi so far as they touch on or relate or howsoever concern the 2nd, 4th, 7th and 9th accused persons (Applicants herein) namely, Abraham Kipchirchir Saat, Godwin Mwagae Mwawongo, Bruno Mugambi Linyiru and Michael Maingi Mbevi respectively in Count II, or instituting any other charges in any other Court against the Applicants over the award of Tender No. REF. GDC/HQS/086/2011-12 and the contract of Tender No. REF. GDC/HQS/086/2011-12 between geothermal development company (GDC) and Bonfide Clearing and Forwarding Company Ltd in respect of rig move services.

4) Such further or other reliefs as this honourable court may deem just and expedient to grant in the circumstances.

Applicants' Case

2. The application was supported by an affidavit sworn by **Peter Ayodo Omenda**, (hereinafter referred to as "the deponent" on whom all the other applicants had conferred authority to plead on their behalf.

3. According to the deponent, **Geothermal Development Company Ltd** (hereinafter referred to as "the Company") is incorporated under the ***Companies Act*** and fully owned by the Government of the Republic of Kenya as a State Corporation carrying on the business of the geothermal exploration, assessment, extraction, utilization and development of natural resources including geothermal heat and steam water and other resources commonly or conveniently used by persons carrying on the business of geothermal resource development.

4. The deponent averred that on 29th October, 2015 and 30th October, 2015 he became aware through Social Media, Electronic Media and the Daily Press that the 1st Interested Party had recommended to the Director of Public Prosecutions (the Respondent) that the Managing Director of the Company, **Mr. Silas Masinde Simiyu,** himself, **Peter Ayodo Omenda, Nicholas Karume Weke, Caleb Indiatsi Mbayi, Abraham Kipchirchir Saat, Michael Maingi Mbevi, Godwin Mwagae Mwawongo** and **Bruno Mugambi Linyiru** who were members of the Tender Committee be charged in court over irregularities involving Rig Move services in the 2012/2013 financial year. It was further averred that on 13th November, 2015 the office of the Respondent issued a press statement and which it posted on its website

stating that the Respondent had on 13th November, 2015 based on the recommendations made on the files submitted to him by the 1st interested considered the evidence in the file, and was satisfied that there was sufficient evidence to sustain the proposed charges against the said GDC officials and directed prosecution to ensue. In the said statement the Respondent referred to the Presidential Address in Parliament on 26th March, 2015.

5. According to the deponent, his name and those of the Applicants were not among the list of certain officers' referred to in the said Presidential Address to Parliament However, on 16th November, 2015, the deponent and the Applicants were summoned to the 1st Interested Party's offices at Integrity Centre and were informed by the investigating officer in charge of the Geothermal Development Company matter at about 10.00 a.m. that they were formally under arrest but would be released upon payment of Kshs. 100,000/= Police Bond and after completion of procedural processes. Accordingly, their finger prints were taken and a charge and caution administered before they were released at 4.30 p.m. after paying the Police Bond and ordered to report to the same EACC Police Station at Integrity Centre on 17th November, 2015 at 7.00 am for the 1st Interested Party to convey them to the Anti-Corruption Court to answer to charges that had been read to them at the police station being:

> **"Charge and Cautionary Statement for the Applicants**
>
> **Nicholas Karume Weke, Abraham Kipchirchir Saat, Peter Ayodo Omenda, Godwin Mwagae Mwawongo, Praxidis Namoni Saisi, Caleb Indiatsi Mbayi and Bruno Mugambi Linyiru,**
>
> **Count 1**
>
> **Wilful failure to comply with the law relating to procurement contrary to section 45(2)(B) as read with section 48(1)(A) of the *Anticorruption and Economic Crimes Act*, 2003.**
>
> **Particulars**
>
> **Abraham K. Saat, Nicholas Karume Weke, Peter Ayodo Omenda, Godwin Mwagae Mwawongo, Praxidis Namoni Saisi, Caleb Indiatsi Mbayi and Bruno Mugambi Linyuri;**
>
> *On or about 29th August, 2012 at Geothermal Development Company Headquarters in Taj Towers in Nairobi County within the Republic of Kenya, being members of the Tender Award Committee, persons whose functions concerned procurement in Geothermal Development Company willfully failed to comply with the law relating to procurement to wit regulation 10(2)(e) of the public procurement and disposal regulations, 2006 by confirming an award of Tender No. Ref.GDC/HQS/2011-2012 to Bonfide Clearing and Forwarding Company Ltd without ensuring that the procuring entity did not pay in excess of prevailing market prices.*
>
> **Count II**
>
> **Inappropriate influence on evaluation contrary to section 38(1)(b) as read with section 38(2)(a) of the *Public Procurement And Disposal Act*.**
>
> **Particulars**
>
> **2 Michael Maingi Mbevi, 4 Godwin Mwagae Mwawongo, 7 Bruno Mugambi Linyiru, 8 Silas Masinde Simiyu**
>
> **9 Abraham Kipchirchir Saat**
>
> *On or about 28th august 2012 at Geothermal Development Company offices in Taj Towers in Nairobi county within the Republic of Kenya, being persons whose functions concerned the Management of the said company and were not entrusted with evaluation and comparison of*

Tender No. REF. GDC/HQS/086/2011-12 in the said company jointly and appropriately influenced the Geothermal Development Company evaluation committee members in their evaluation and comparison of the Tender No. REF. GDC/HQS/086/2011-12.

6. The deponent averred that on 17th November, 2015 h and the Applicants reported at the 1st Interested Party's police station at integrity center and were re-arrested and conveyed to the Chief Magistrates Anti-Corruption Court at Milimani Law Court, Nairobi where they were charged in Anti-Corruption Case Number 20 of 2015, **Republic –vs- Nicholas Weke & 8 Others** with himself as accused number 3 with the following charges;

Count I

"Wilful failure to comply with the laws relating to procurement contrary to section 45(2)(B) as read with section 48 of the ***Anti Corruption and Economics Crimes Act*** No. 3 of 2003

(1)Nicholas Karume Weke, (2) Abraham Kipchirchir Saat, (3) Peter Ayodo Omenda, (4) Godwin Mwagae Mwawongo, (5) Praxidis Namoni Saisi, (6) Caleb Indiatsi Mbayi, (7) Bruno Mugambi Linyiru

Count II

Inappropriate influence on evaluation contrary to section 38(1)(b) as read with section 38(2)(a) of the *Public Procurement And Disposal Act*.

Particulars

2 Michael Maingi Mbevi, 4 Godwin Mwagae Mwawongo, 7 Bruno Mugambi Linyiru, 8 Silas Masinde Simiyu, 9 Abraham Kipchirchir Saat

On or about 28th august 2012 at Geothermal Development Company offices in Taj Towers in Nairobi county within the Republic of Kenya, being persons whose functions concerned the Management of the said company and were not entrusted with evaluation and comparison of Tender No. REF. GDC/HQS/086/2011-12 in the said company jointly and inappropriately influenced the Geothermal Development Company evaluation committee members in their evaluation and comparison of the Tender No. REF. GDC/HQS/086/2011-12.

7. According to the deponent, the Company advertised in the Standard Newspaper of 4th July 2012 for Tender No. REF. GDC/HQS/086/2011-12 provision of Rig Move Services for Menengai Geothermal Project (hereinafter refeed to as "the said Tender") and cited in count I in the Anti-Corruption Case No. 20 of 2015 as against the Applicants. It was averred that the said Tender was a procurement undertaken, processed by the Company pursuant to the ***Public Procurement and Disposal Act 2005*** and the ***Public Procurement and Disposal Regulations 2006*** and that it culminated in the signing of a contract as prescribed in the said Act and Regulations.

8. According to the deponent, on the face of it, at Instruction to Tenderers at 2.22.1 and or 2.24.1 of the contract for Tender No. Ref. GDC/HQS/086/2011-12 entered between **Geothermal Development Company Ltd** and **Bonfide Clearing and Forwarding Company Ltd** the anchor of Count II of the Anti-Corruption charges thrust against the applicants namely **Abraham Kipchirchir Saat, Michael Maingi Mbevi, Godwin Mwagae Mwawongo and Bruno Mugambi Linyiru** in Anti-Corruption Case No. 20 of 2015, that, being persons whose functions concerned the Management of the said company and were not entrusted with evaluation and comparison of Tender No. REF. GDC/HQS/086/2011-12 in the said company jointly and inappropriately influenced the Geothermal Development Company evaluation committee members in their evaluation and comparison of the Tender No. REF. GDC/HQS/086/2011-12 provides for the criteria upon which the tender was to be evaluated.

9. It was averred that it was clear that on the face of it there was no inappropriate influence as the criteria

for evaluation of bids was to be undertaken in strict adherence and in compliance with the criteria set out in Tender No. REF. GDC/HQS/086/2011-12 document cushioned by section 66(1) & (2) of the ***Public Procurement and Disposal Act, 2005***. He averred that at no point was the Evaluation Committee's recommendation for award changed and neither were they advised nor requested by anyone to change. To the deponent, in the event that the Evaluation Committee was advised such advise was given in good faith and in conformity with section 27(1) & (2) of ***Public Procurement and Disposal Act, 2005*** read together with regulation 7 of the ***Public Procurement and Disposal Regulations.*** The deponent deposed that the said Act and Regulations, places the responsibility for management of Tenders for procurement on the accounting officer and who pursuant to section 27(1) & (2) intervened to bring the actions of the Evaluation Committee within the purview of the law as it was not within the mandate of the Committee to consider extraneous matters other than the criteria set out in the Tender No. REF. GDC/HQS/086/2011-12. He averred that the above action in the case of Geothermal Development Company Ltd was placed on the Managing Director/Chief Executive Officer who rightfully summoned the applicants namely **Abraham Kipchirchir Saat, Michael Maingi Mbevi, Godwin Mwagae Mwawongo** and **Bruno Mugambi Linyiru** together with members of the Evaluation Committee to address the illegalities and bias of the Committee in introducing matters outside their mandate and also to avert any litigation by any bidder as consequence of the actions of the Committee.

10. To the deponent, the contract, the subject of the prosecution in Anti-Corruption Case No. 20 of 2015 on the face of it had no inappropriate influence for the reasons stated above. He disclosed that section 68 of the the Act stipulates that the person submitting the successful Tender and the procuring entity shall enter into a written contract based on the Tender documents, the successful Tender, any clarifications under section 62 and any corrections under section 63. Further, section 26 of the the Act provides for segregation of responsibilities in a public entity and provides for threshold matrix of all procurements.

11. The deponent averred that Tender No. REF. GDC/HQS/086/2011-12 was open tender under "Part V-Open Tendering" of the Act and that under an open tender, each bidder quotes its price in the hope that its price will be the best price. Further, under section 52(3) (i) of the Act the tender document shall set out the procedures and criteria to be used to evaluate and compare the tenders while section 66(2) of the stipulates that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

12. It was deposed that Tender No. REF. GDC/HQS/086/2011-12 does not on the face of it and in terms of section 66(2) allow the introduction of criteria that was not contained in the tender document. According to the deponent, the charge in count I against the Applicants which in hindsight calls upon the Tender Committee to embark on a comparison of price for a service that is not contemplated by section 30(3) of the Act is therefore ultra vires.

13. The deponent cited section 30(3) of the the Act which stipulates that standard goods, services and works with known market prices shall be procured at the prevailing real market price and disclosed that the Public Procurement Oversight Authority (PPOA) established under section 8 of the Act publishes market price index. It was however contended that the procurement by Geothermal Development Company, Tender No. REF. GDC/HQS/086/2011-12 was not for a service whose price was published in the Public Procurement Oversight Authority (PPOA) market price index so that it could be said that the tender committee failed to comply with regulation 10(e) to ensure that procuring entity did not pay in excess of prevailing market prices. According to the deponent, the procurement in Tender No. REF. GDC/HQS/086/2011-12 was not standard goods, services and works with known market prices as stipulated at section 30(3) to be procured at the prevailing real market price as set out in Public Procurement Oversight Authority (PPOA) published market index. He cited Regulation 8 (3)(q) of the ***Public Procurement and Disposal Regulations 2006*** which stipulates that the functions of the procurement unit established at regulation 8(1) shall act as a secretariat to the tender Procurement and Disposal Committees and at regulation 8(3)(z) that the procurement unit shall carry out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee. To him, none of these are duties of the Tender Committee as set out in the Regulations 10 of the ***Public Procurement and Disposal Regulations, 2006.***

14. The deponent reiterated that provision of Rig Move services as per the Public Procurement Oversight Authority (PPOA) is not standard goods, services and works with known market prices and the charges preferred against the Applicants alleging that they willfully failed to comply with law relating to procurement to wit regulation 10(2)(e) of the ***Public Procurement and Disposal Regulations 2006*** by confirming an award of Tender No. REF. GDC/HQS/086/2011-12 which contained a price of Kshs. 42, 746,000/= Per Rig move to Bonfide Clearing and Forwarding Company Ltd in respect of Rig Move services and that they used their office to improperly confer a benefit to Bonfide Clearing and Forwarding Company Ltd was illusory, an errant abuse of the court process as no iota of the ingredient of an offence have any basis in law or on the face of it.

15. The deponent therefore averred that the decision by the 1st Interested Party to recommend for the applicants' prosecution and the Respondent's decision to the 1st Interested Party's recommendation and to prosecute the Applicants in the premise is an enterprise in capriciousness, high handedness, abuse of the process of the court, using the criminal justice system not for the enforcement of the law but to the whims of others.

16. It was disclosed that **Praxidis Namoni Saisi**, the Accused Number 5 in Criminal Case No. 20 of 2015 made an application for Judicial Review No. 502 of 2015 in respect of Counts No. I, III, IV of the charge and that this Court in its judgement of 19th day of April, 2016 quashed the charges facing the said **Praxidis Namoni Saisi** more particularly Counts No. I, III and IV. Based on the said judgement and legal advice, the applicants herein believed that there is nothing that remains to be tried as contained in the said count No. 1 in Criminal Case No. 20 of 2015 in the Anti-Corruption Court against myself and the Applicants. To them, the substratum of the case does not exist as it relates to the deponent, **Nicholas Karume Weke, Caleb Indiatsi Mbayi, Abraham Kipchirchir Saat, Michael Maingi Mbevi, Godwin Mwagae Mwawongo** and **Bruno Mugambi Linyiru**, in view of the said Judgment.

17. The Applicants contended that they could not prosecute this application earlier due to lack of funds as the Applicants besides the Criminal Case No. 20 of 2015, had also filed an application at the Employment and Labour Relations Court, Cause No. 319 of 2016 in relation to the restructuring of the organization that was going to affect them adversely.

Respondent's Case

18. According to the Respondent, the Ethics and Anti-Corruption Commission, the 1st interested party herein (hereinafter referred to as "the Commission" or "the EACC") commenced investigations into allegations of irregular procurement at **Geothermal Development Company (GDC)** emanating from procurement of Rig Move services for Menengai Geothermal project, tender no. **GDC/HQS/OT/086/2011-12** which investigations revealed that this tender was awarded to **M/S Bonafide Clearing and Forwarding Company limited** at Kshs. **42,746,000** per rigmove in September 2012. This figure, it averred, represents an approximate escalation of about 300% when compared with a similar tender awarded to the same firm at Kshs. 19,500,000 per move in the previous year 2011.

19. It was averred that the complaint and investigation was concerning Procurement anomalies in the tender process which were summarized as follows:

i. The tender for Rig Move services was advertised on 2nd July 2012 in the *Daily Nation* and on 4th July 2012 in the *Standard Newspapers* with a closing date of 26th July 2012.

ii. A mandatory site visit of the project area in Menengai was done on 12th July 2012 as per minute/site attendance register and bidders were issued with site visit certificates.

iii. On 23rd July 2012 a Tender Opening Committee was appointed vide a memo signed by **Silas Masinde Simiyu** the Managing Director and CEO of GDC. This comprised **Justus Muhambi**, **Yussuf Hussein** and **Ludasia Ochieno**. On 26th July 2012, in the presence of bidder's representatives, tenders were opened and six firms submitted their bids as follows:

Name of the Firm	**Tender Sum**
Danki Ventures	Kshs. 22,105,540
Bonafide C & F Ltd	Kshs. 42,746,000
BBP Logistics EA. Ltd	Kshs. 19,250,000
Civicon Ltd.	USD. 233,740
P.N. Mashuru LTD.	Kshs. 18,038,000
Waki C& F	Kshs. 35,000,000

iv. On 25th July 2012 a Tender Evaluation Committee was appointed vide a memo signed by **Silas Masinde Simiyu** the Managing Director and CEO of GDC comprising **Joseph Muhati**, **Thomas Miyora**, **Lawrence Murungi** and **Victor Waswa** .

a) The evaluation committee carried out evaluation as stipulated in the tender document and submitted its report dated 14th August 2012. This report recommended M/s Bonafide Clearing and Forwarding at their tender price of Kshs. 42,746,000 per rig move.

b) Under the sub-head titled “justification” this report outlined the resources required for a rig move relating to two rigs. This was compared to those resources available at the Company. This section concluded by stating that the Company was not in a position to carry out rig move economically hence the need to outsource.

c) Under the sub-head titled “clarification sought” the committee deliberated whether it was a mandatory requirement for suppliers to provide proof of past contracts. This was in particular reference to BBP Logistics EA which had failed to meet other criteria that had disqualified them.

d) Under sub-head 5.3 Financial Evaluation, a title “Note” is included. This section observes a clarification concerning BBP Logistics’ bid would have saved GDC Kshs. 23,000,000 per rig move.

e) This report was subsequently forwarded to **Michael Maingi Mbevi**. On 17th August 2012 **Joseph Muhati** states that he received pressure from **Michael Mbevi** and **Abraham Saat** through email communications to change the evaluation report. On 28th August 2012, all the members of the evaluation committee were called to a meeting in their head office and present in the meeting was **Silas Masinde Simiyu**, **Michael Mbevi**, **Abraham Saat**, **Godwin Mwawongo** and **Bruno Linyiru**.

f) This meeting discussed the evaluation report dated 14th August 2012. As a result, the report was amended and signed on 28th August 2012.

g) In the revised report, dated 28 August 2012, the "justification" section was altered by omitting the tables and analysis of resources. The section titled "clarification" and "note" as well as their contents was also deleted.

v. On 29th August 2012 the **tender committee** sat to deliberate this tender. The committee comprised **Nicholas Weke**, **Bruno Linyuri**, **Dr. Peter Omenda**, **Godwin Mwawongo, Praxidis Saisi**, **Caleb Indiatsi** and **Abraham Saat**. Under minute MIN 6 TC 5/2012-13, the tender committee approved the award of tender no. **GDC/HQS/OT/086/2011-12** to **M/S Bonafide Clearing and Forwarding Company limited** at Kshs. **42,746,000** per rig move.

vi. A notification was done to the winning bidder and regret letters to those who lost the tender

vii. On 2nd October 2012 a contract agreement between GDC and M/S Bonafide Clearing and Forwarding Company limited was signed. **Silas Masinde Simiyu** signed the contract on behalf of the Company and **Amos Ngojo** signed on behalf of M/S Bonafide Clearing and Forwarding Company limited.

20. It was further averred that investigation further revealed that in the financial year 2010/2011, the Company procured rig move services for its Menengai Geothermal project vide tender no. GDC/HQS/OT/2010-2011 which tender was awarded to M/S Bonafide Clearing and Forwarding Company limited at Kshs. 19,550,000 per move. Further investigations revealed that KENGEN procurement for rig move services at Olkaria and Eburru Geothermal fields vide tender no. KGN-OLK-179-2012 resulted in an agreement dated 5th February 2014 between KENGEN and M/S Bonafide Clearing and Forwarding Company Limited and that the cost of rig moves under this contract ranged between Kshs. 13,565,040 and Kshs. 24,429,600.

21. Following the aforesaid investigations, the Commission recommended that **Silas Masinde Simiyu, Abraham Saat**, **Nicholas Weke, Peter Omenda, Godwin Mwawongo**, **Praxidis Saisi**, **Caleb Indiatsi** and **Bruno Linyuri** be charged with the offences named in the charge sheet in Anti Corruption Case of No. 20 of 2015 at the Chief Magistrate Court Nairobi after concluding that the Company did not get value for money since the tender price of Kshs. 42,746,000/= was above the normal market rates based on comparing tender GDC/HQS/086/2011-12 with tender GDC/HQS/038/2010:2011 and Kengen tender no. KGN/OLK-179-2012.

22. It was the Respondent's case that upon analysis of evidence on the investigation file, the DPP agreed with EACC that there was sufficient evidence to charge all the accused persons in Anti-corruption case no 20 of 2015 with the offences they have been charged with in the said case.

23. According to the Respondent relied on section 66(2) of the repealed ***Public Procurement and Disposal Act*** that provided that *the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used* ought not to be read In isolation but together with Regulation 10 (2) (e) of the ***Public Procurement and Disposals Regulations, 2006***, which provides that *"the function of the tender committee shall be to ensure that the procuring entity does not pay in excess of prevailing market prices"*. It was therefore the Respondent's position that it was within the law for the tender committee to compare the market prices and that Count 1 does not call upon the tender committee to embark on comparison of prices for a service that is not contemplated by section 30(3) ***Public Procurement and Disposal Act 2005***.

24. The Respondent averred that section 27(3) of the ***Public Procurement and Disposals Act, 2006*** places Responsibilities on each and every employee or a member of the board or committee to ensure compliance with Regulations and directions of the Authority.

25. As relates to count *ii* the Respondents respose was that the Applicants' allegation that the advice to evaluation committee was in compliance with section 27 (1) & (2) PPDA, 2005 and regulations as the committee had introduced the need justification and analysis and clarification which was outside their mandate in breach of section 64(1) & 66(1) & 2 PPDA, 2005 and regulations 48,49,50 PPDR, 2006 was

itself is an admission of irregularity.

26. It was therefore averred that the decision to charge the Applicants in this case alongside other suspects named in the said charge sheet was based on Analysis of evidence on the investigation file and determination that the same was sufficient to prosecute the Applicants alongside others and was based on correct interpretation of the law relating to procurement and other applicable laws and regulations and in tandem with the constitution and therefore there was no violation of the constitution or misinterpretation of any provision of the law that was done in the process leading to the decision to charge the Applicants.

27. In any event, it was deposed, the challenges raised by the Applicants on the decision to charge them in the Anti Corruption case No 20 of 2015 constitute a defense available to them to raise during prosecution of the said case and not by way of judicial review which is concerned with the legality of the process leading to the decision to charge and not the merit of the decision to charge which ought to be determined by the trial court in the criminal case.

28. The Respondent therefore took the view that the Applicants failed to demonstrate that the decision to charge was arrived at either through unlawful or illegal process or is contrary to the constitution or any provision of any written law or rules made thereunder or the rules of natural justice and accordingly prayed that the Notice of Motion filed herein be dismissed with costs.

The Commission's Case

29. According to the Commission, it received a complaint of failure to comply with procurement law by the Geothermal Development Company (GDC) Tender Committee emanating from procurement of rig move services tender no. GDC/HQS/OT/096/20011-2012 between July and August 2012 allegedly at an inflated contract price by the same service provider previously engaged by the Company which allegations were within the mandate of the Commission to investigate.

30. According to the Commission, investigations did reveal that the contract price for the said tender was unjustifiably inflated in comparison to the same rig move services undertaken by other government institutions during the same period by the same service provider. Further, it established that the Company's Tender Committee, disregarded its duty of care towards the Company in awarding the said tender, which in the alternative would have saved the Company 50% of the contract price. To the Commission, under the ***Anti-Corruption and Economic Crimes Act, 2003***, it is an offence for a person to willfully fail to comply with the law relating to procurement.

31. It contended that the issue on whether or not the charges are proper is an issue for a trial court and not a ground for this Honourable Court to stop prosecution and terminate the criminal case. In its view:

a. The Commission takes up complaints and initiates investigations independently after which it forwards its recommendations to the Respondent.

b. Apart from the mention of isolated provisions of the Constitution, the Applicant has not demonstrated in the Substantive Motion how her rights have been violated.

c. The Applicant herein is using this Court to subvert the criminal process.

d. The purported Substantive Motion herein does not raise any Constitutional issue for determination by this Honorable court.

e. The Applicant herein is using this Court to determine issues of fact which are within the jurisdiction and competence of the trial court.

f. The contested matters of fact are issues for determination by the criminal court and do not constitute grounds for preventing the prosecution of the Applicant.

g. During the trial, the Applicant shall be afforded the opportunity to defend herself.

h. The Constitution and the Criminal Procedure Code among other laws have adequate mechanisms for securing the rights of accused persons at the trial.

i. There is no likelihood that the Applicant will suffer irreparable harm unless orders are issued pending the hearing and determination of the Substantive Motion.

j. That there is no demonstration in pleadings or otherwise that any of the Applicant's rights have been violated.

32. To the Commission, the Applicant has not produced any evidence to demonstrate that the Commission has in this case acted otherwise than in accordance with its Constitutional and legal mandate. Further, the Applicant failed to demonstrate that she is unlikely to receive a fair trial before the criminal court where she has been charged among others or that the criminal proceedings before the said trial court will be conducted otherwise than in accordance with the law where her criminal culpability, if any, can only be determined.

33. It was contended that the Applicant all along had been accorded hearing in the investigation process and the entire investigations has been devoid of any malice and that throughout the entire investigation, the Commission acted independently, professionally and with due regard to the Constitution and the law.

34. It was asserted that Article 50 of the Constitution deals with the rights of accused persons during trial hence the substantive Motion was frivolous and vexatious and did not disclose any prima facie cause of action against the Commission.

35. While urging the Court to dismiss the motion, the Commission argued that the granting of the orders sought will be tantamount to fettering the Commission in the execution of its mandate and allowing the court to fully canvass on matters which should be left to the criminal trial.

Determination

36. I have considered the application, the affidavits both in support of and in opposition to the petition, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto.

37. It is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

38. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

39. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct."

40. However, in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court

simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a

fair trial...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

41. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

42. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

43. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the

following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

44. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei**

& 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that :

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of** *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* **is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book,** *Constitution of the World*: **"The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

45. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."**

46. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

47. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

48. In this case the applicants relied on this Court's decision in **Republic vs. Director of Public**

Prosecutions & 2 Others exp Praxidis Namoni Saisi [2016] KLR. It is therefore important for this Court to reproduce the salient findings in that case. In that case, the Court expressed itself *inter alia* as follows:

> **"In this case, it is clear that counts III and IV are grounded on the execution of the contract. It was however contended by the applicant which contention was not disputed that the applicant only witnessed the signature of the Chairman of the Board. In those circumstances, can it be said that the applicant by merely attesting the said signature conferred a benefit on the entity to which the tender was awarded? With respect to count I, the applicant's case is that the consideration being used as a basis for the commencement of the criminal charges was not a criteria provided for in the tender document. It was the applicant's case that this charge in hindsight calls upon the Tender Committee to embark on a comparison of prices for a service that is not contemplated by section 30(3) of the Act which such comparison is therefore ultra vires. In other words the applicant contends that the basis upon which the criminal charges are preferred is outside the ambit of the tender documents hence the applicant was not expected to take the same into account in determining the award of the tender. It was further contended that since the Public Procurement Oversight Authority had not published the market price index for the goods which were being procured the applicant could not have by hindsight complied therewith. It was contended that what the members of the tender committee were accused of not having performed was the responsibility of the procurement unit established at Regulation 8(1) which acts as a secretariat to the Tender Procurement and Disposal Committees and which carries out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee. In other words, the applicant's contention was that the blame was being placed on the wrong entity."**

49. The Court then considered section 66(2) of the repealed ***Public Procurement and Disposal Act*** and found that the Respondent had not contended that the issue of comparison in past prices was one of the criteria in the tender document. In the absence of the evidence from the Respondent to the contrary, the Court found that to expect the applicant to have introduced the same in determining the award of the tender would clearly have been a violation of the law. To the Court decide to charge a person for not taking an action which would have amounted to a violation of an express provision of the law, is clearly irrational.

50. Just like in ***Praxidis Case***, it is my view that whereas this is not the forum to determine the applicant's innocence or culpability, the DPP owes this Court a duty of placing before this Court material upon which this Court can feel that he is justified in mounting the prosecution.

51. Therefore where it is clear to the Court that based on the admitted factual scenario the charges leveled against the applicant are far-fetched it would not be permissible for the Court to permit the applicant face the charges simply because she will have an opportunity of defending herself. It is therefore clear that the said three counts facing the applicant are untenable. I reiterate what was held in **Githunguri vs. Republic [1986] KLR 1** at page 18 and 19 where a three bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru** expressed themselves as follows:

> **"But from early times… the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse…The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court…Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section 26 can be interfered with. What this**

application is questioning is the mode (emphasis ours) of exercising those powers…No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity…A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”

52. Having considered the material placed before me and based on the decision in ***Praxidis Case*** (supra), I find merit in this application in so far as count I is concerned. However Count II was not dealt with in the said case. Having considered the material placed before me, it is my view that the contentions of the applicants amount to defences in law. The Respondent contends that as relates to count II the the Applicants' position that the committee had introduced the need justification and analysis and clarification was outside their mandate in breach of section 64(1) & 66(1) & 2 PPDA, 2005 and regulations 48,49,50 PPDR, 2006 was itself is an admission of irregularity. Accordingly, I cannot say that this position even if true may not constitute an offence. Whereas the trial Court may, at the end of the day find in favour of the applicants on the issue, it is not for this Court to make a decision on the innocence of the applicants.

Order

53. Consequently, the order that commends itself to me and which I hereby grant is an order of prohibition prohibiting the Respondent from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case Number 20 of 2015 between the ***Republic vs Nicholas Karume & 8 others*** before the Chief Magistrate's Court Milimani law Courts Nairobi so far as they touch on or relate or howsoever concern the 1st, 2nd, 3rd 4th, 6th 7th and 9th accused (Applicants herein) **Nicholas Karume Weke, Abraham Kipchirchir Saat, Peter Ayodo Omenda, Godwin Mwagae Mwawongo, Caleb Indiatsi Mbayi, Bruno Mugambi Linyiru** and **Michael Maingi Mbevi** respectively in Count I.

54. As the Motion was improperly intituled in the names of the applicants rather than the Republic there will be no order as to costs.

55. It is so ordered.

Dated at Nairobi this 20th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okwe-Achiando for the Applicant

Mr Ashimosi for the Respondent

CA Mwangi